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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 541

ANNE VILBERT DE SAIRIGNE,

Petitioner,

vs.

FRANK JAY GOULD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

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ANNE VILBERT DE SAIRIGNE,
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PETITION FOR A WRIT OF CERTIORARI

To The Honorable The Chief Justice of the United States and to the Honorable The Associate Justices of the Supreme Court of the United States:

Plaintiff, Anne Vilbert de Sairigne, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered the 22nd day of November, 1949, which "affirmed in open Court" the order and judgment of District Judge ALFRED C. COXE, entered in the Southern District of New York, March 14th, 1949, dismissing the complaint herein.

In support of her petition she respectfully shows as follows:

I. The Opinion and Decisions Below.

The four word decision of the Court of Appeals has not been reported, but is to be found in *New York Law Journal,* Vol. 122, No. 89, November 7, 1949, page 1157, column 6. The opinion of the District Court is reported in 83 F. Supp. 270 and is printed in this record at pages 46-51; Judge COXE's order denying petitioner's motion for reargument is printed at page 45.

II. Jurisdiction.

This is a case involving diversity of citizenship in a suit by an alien on a foreign contract against an American resident here. The judgment of the Court of Appeals was entered November 22, 1949, "ordering, adjudging and decreeing that the judgment of the District Court be affirmed", and its mandate transmitted to and entered in the District Court. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The time for presenting this petition expires February 22nd, 1950, under 28 U. S. C. Sec. 2101(c).

III. Question Presented.

This is a case of first impression, in so much as in a diversity case an *alien* invokes the jurisdiction of a United States District Court to sue in contract for damages against an American resident in the Southern District of New York upon a stopped check issued by defendant-appellee to plaintiff-appellant in France and payable at a New York bank in New York City.

(a) We submitted to the Court of Appeals that the recent series of cases decided last May 31st, while our appeal pended, hold that under the doctrine of *forum non conveniens,* there is now permitted by 28 U. S. C. Sec. 1404(a), only a *transfer* within the Federal judicial structure, and not the absolute *dismissal* of any diversity suit, such as was erroneously granted here in both the courts below. See:

Ex Parte Collett, 337 U. S. 55;
Kilpatrick v. *Texas,* 337 U. S. 75;
United States v. *National City Lines,* 337 U. S. 78.

The Court of Appeals could not find that these cases applied, in its summary dismissal of our cause.

(b) In response to a question from the appellate bench, appellee argued, with apparent effectiveness, that under the common law of New York this is not a "commercial contract case", and, so, not necessarily suable in the courts of the state. Thus, further error raised its head in a suggestion, that contrary to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, a federal common law exists different from that found by the state court of the vicinage, particularly under *Terry* v. *Williams* (1938, First Department), 253 App. Div. 890, leave to appeal to the Court of Appeals denied, 254 App. Div. 557.

IV. Summary Statement of Matter Involved.

Since July 1948 (Record, p. 2), appellant has sought a trial on the merits of her claim under a check for $400,000 drawn February 20, 1944 by Frank Jay Gould in France to her order upon the United States Trust Company of New York and payable by the bank at 45 Wall Street in that City; but stopped by Gould there on presentation three years later on February 25, 1947. Baroness de Sairigne, we allege, through the "underground" protected Gould from the Nazis seeking him, and he fixed her services at this value (Record, complaint, pp. 3-5).

At the outset we emphasize that the check was not stopped until nearly two years after the German unconditional surrender of May 1945 and the Nazis had even before then lost military control of France, when Gould could find protection by his own government from any element of coercion, call it by what name you will (Record, pp. 20-21).

Ironic questionings from the appellate bench make surmise that our case was thus colored and obscured, although:

1. No charge of sharp dealing is anywhere alleged in this record. Counsel for Gould have at no time uttered the ugly and shorter or longer word;

2. No answer to our complaint has yet been filed, nor any defense on the merits disclosed;

3. Counsel for the Baroness have fully disclosed the basis of her case in the complaint and affidavits.

We submit, there is no record reason in this case for viewing with alarm or pointing with scorn, nor anything *de hors* the record, which appellant's counsel either know, or even suspect, that would justify their withdrawal from this case! If appellee's counsel can document even a sly dig, they have heretofore *never* openly made, directly or by innuendo, why did they not some place in this record, like Chapman's Homer, "speak out loud and bold"!

If this complaint is defective under its allegations of French and American law, as it has been attacked technically by appellee, no mention of a defect is made in the opinion of the District Court or in the summary decision of the Court of Appeals; *nor have we been permitted to plead over under the liberalized current, or even predecessor practice; instead our cause is dismissed absolutely and withal* (Record, pp. 8-9; p. 34; p. 45).

(a) No issue of proper service or jurisdiction of appellee's person is raised or can be raised at any point; this service was made upon Gould's business agent at 1 Wall Street, where Gould has a business office (Record, pp. 22-23). Gould's counsel states that Gould, "although a citizen of New York is actually physically present in France, where he is sojourning for reasons of health * * *" (Record, p. 10). Gould has a 24 room house at "Ardsley Park", Ardsley-on-the-Hudson, Westchester County, New York, within the Federal Southern Judicial District, with

a public telephone listing in his name for this house; just as his name is publicly listed for his City office at 1 Wall Street, New York City (Record, pp. 38-39). Appellee appeared generally. After his counsel's letter at page 23 of the record, he obviously could not withdraw.

(b) Gould makes no affidavit for this record; nor do the affidavits upon his behalf made by his American counsel *only,* disclose any defenses *on the merits;* only Gould's bad health, *forum non conveniens,* and a claim that *on the face of the complaint,* appellant could not prevail under the conflict of laws are all that are offered before even pleading to our complaint. We have seen bad health urged as reason for an adjournment or a continuance; just as we have experienced the curative balm of amendments to a pleading found insufficient in its technical allegations. Never before have we seen a plaintiff denied entrance to the very threshold of our Courts and the portals closed and locked before her, under such arguments. Nor do we take it, that such arguments were anywhere persuasive below; only *forum non conveniens* seems at all to have swayed the Courts below.

Therefore, we proceed to the nub of the two decisions below: may a District Court in the *exercise of discretion* under the doctrine of *forum non conveniens* or by *vis major dismiss* a suit brought by an alien for damages under a foreign contract, but breached here, against an American citizen resident and domiciled here?

Of course, with the complaint unanswered, and under the affidavits read here on Gould's behalf, no grounds for the exercise of discretion exist at all, if discretion is found persisting in the law of these cases. It seems, to us, apparent, that a defense must be disclosed or allegations made *substantially* that a defense will *sometime and somewhere* be made, before discretion becomes entangled in the

very roots of the case at bar. Even then there could be only transfer to another United States Court, not dismissal with *bon voyage* and *au revoir* as we stop and think of that beautiful town that is seated by the Seine or any other place or country where Gould may "*temporarily* sojourn for his health", or to defend this cause of action.

So we proceed to the statutes conferring jurisdiction.

V. Statutes Involved.

We present ourselves under 28 U. S. C. Sec. 1332(2), where after recital of the familiar amount in controversy the District Courts have original jurisdiction and the action is between:

> "(2) Citizens of a State, and foreign states or citizens or subjects thereof;"

Our venue is laid under 28 U. S. C. Sec. 1391(a):

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Plaintiff-appellant is a French national, resident and domiciled in France (although in New York when suit was started, (record p. 4); whilst defendant-appellee is an American national, resident and domiciled and doing business in the Southern District of New York; but, by his New York counsel's sworn statement is, "physically present in France where he is sojourning for reasons of health * * *" (Record, p. 10).

Under U. S. C. Sec. 1404(a) such a cause may be transferred, but not dismissed, as follows:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may

> transfer any civil action to any other district or division where it might have been brought. • • •"

Gould seeks no transfer "to any other district or division"; nor do we know of any other district where appellee might have brought her action against him; although under U. S. C. Sec. 1391(d), "An alien may be sued in any district."

This action having been begun in the Federal District Court, no power of removal from a state court has ever arisen herein.

Certiorari here is sought under U. S. C. Sec. 1254(1) as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. • • •"

Since judgment was entered in the Court of Appeals on November 22nd, 1949 and its mandate sent to the District Court, appellee has 90 days, or until February 22, 1950 to apply for certiorari herein under 28 U. S. C. Sec. 2101(c):

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, • • •"

We do not at this time seek the solace of the exception that follows this quotation.

No previous application for certiorari or for review here has been made.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that Honorable Court to certify and send to this Court for review and determination a full and complete transcript of the record of all proceedings of that Court had in this case numbered and entered on its docket as Civil No. 46-738 and No. 21,384, Anne Vilbert de Sairigne, plaintiff-appellant, against Frank Jay Gould, defendant-appellee, to the end that the judgment of that Court may be reviewed and determined by this Court according to the Constitution and laws of the United States and of the State of New York; that the judgments, orders and determinations of the District Court and Court of Appeals be reversed; and for such other and further relief as to this Court may deem just and proper.

Dated, December 8, 1949.

ANNE VILBERT DE SAIRIGNE,
Petitioner

By MARTIN J. KELLY, JR.,
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BRIEF IN SUPPORT OF PETITION

I.

Under the Collett series of decisions of this Court handed down May 31st, 1949, the new transfer provision of Section 1404(a) of the Judicial Code applies to any civil action in the Federal District Courts. Even the dissentients expressing their opinion in the companion *National City Lines* case, resolve all doubts "by reading Section 1404(a) as making the doctrine of *forum non conveniens* applicable to any civil action as to which the venue provisions are codified in revised title 28". The case at bar being a diversity case on contract brought under those venue provisions should have been entertained and not dismissed on jurisdictional or discretionary grounds.

In despite of the *Collett,* the *Kilpatrick* and the *National City Lines* cases decided the same day last May and reported in 337 U. S. 55 et seq., *supra,* the Court of Appeals has affirmed the judgment of the District Court in *dismissing* a suit on a bank check brought by an alien against a citizen resident here. District Judge Coxe was not informed, of course, of the doctrine declared in the *Collett* series of cases, when he decided the case at bar in February 1949. He reached out to the Ninth Circuit for *Heine* v. *N. Y. Life Insurance Co.,* (1931), 50 F. (2d) 382 and relied also upon *Cuba R. R. Co.* v. *Crosby,* (1912), 222 U. S. 473 at 480, a tort case, and also upon some admiralty cases to sustain his exercise of discretion in *dismissing* under *forum non conveniens,* rather than *transferring* the case at bar. Judge Coxe in his opinion refers to the new Judicial Code as "codified", overlooking that the very title of the Act names it as "*Revised,* Codified and Enacted". So, too, does this Court in the *Collett* cases recognize the

new and shining mintage, as contrasted with a mere collection basket of ancient tarnished statutes. The Court of Appeals was informed in a footnote of our main brief, dated June 2, 1949, of the *Collett* series of cases and we fully discussed them in our reply brief. In that series the several District Courts all correctly *transferred* each case and were all *upheld* by this Court. The *Heine* case would now undoubtedly be *transferred* from Oregon to the Southern District of New York. It was never reviewed here. *The Cuba R. R. Co.* case dealt with an *American* citizen plaintiff suing a *New Jersey* corporate defendant on a cause of action arising in Cuba. Admiralty cases *may be sui generis,* so far as we have been presently informed. A hint is found in Mr. Justice BRANDEIS' notes under *Canada Malting Co.* v. *Paterson Steamships Ltd.* (1932), 285 U. S. 413, 421-2. The Court of Appeals and the District Court were each informed in our main briefs of the historical background of the *Revision* and Codification that became Title 28, § 1404(a) of the Judicial Code. Appellee found the best argumentative approach to the *Collett* series to be a three line reference to them at page 19 of his main brief of 35 pages. We thought we had answered all, when we partly coined, in reliance on the *Collett* cases, a Latin tag:

"Washingtonum locutum est; causa finita est."

We sympathetically understand why appellee should almost ignore the *Collett* cases; for why should he rush in where angels fear to tread? Yet when we finally ascended to the bar of the intermediate appellate bench, we were distressed and cast down by the judgment of an *ex cathedra* summary utterance—"the cases do not apply." We seek *here* an infallible pronouncement from this haven of last resort.

Although, it is true that none of the plaintiffs in the *Collett* and its two companion cases was an alien, yet, Mr. Chief Justice VINSON refers to "any civil action" as controlled by the new transfer provisions; he also refers to § 1391 for the venue provisions under which first we approached the Courts and came into disaster. He further states in the *National City Lines* case, "Obviously an example is not a complete catalogue" (p. 81). We most respectfully submit, that this Honorable Court was not suffering from invincible ignorance by overlooking or forgetting that suits by and against aliens provided for by the very venue provisions of the new Judicial Code it cites in those opinions, might and should be added to the "examples" actually adjudicated in the *Collett* cases.

Either we have misread the *Collett* cases, or we have not; therefore, we shall not trouble the Court with further examination of the principles it has so lately enunciated.

We turn now to a secondary issue dealing with the common law of New York; secondary, we say, because if the *Collett* cases hold what we believe them to hold, we should be permitted to go to trail under the Revision of the Judicial Code, without the added help of the principle of *Erie R. Co.* v. *Tompkins,* we shall now discuss.

II.

The Courts of New York will entertain foreign contract cases for damages, whilst refusing in discretion to entertain foreign tort claims. Equity cases, derivative and stockholders suits, claims against decedents estates and others are treated under different principles. The Courts below have violated the principle of *Erie R. Co.* v. *Tompkins* by ignoring New York common law in a diversity case.

Although the venue of actions is fixed by our Civil Practice Act and has had statutory sanction since at least

the first Field codes; nonetheless the Courts of New York by interpretation have worked out a "common law" in refusing or accepting cases between non-residents arising in other jurisdictions.

Furbush v. *Nye* (1897, First Dept.), 17 App. Div. 325;
Wertheim v. *Clergue* (1909, First Dept.), 53 App. Div. 122;
Holzer v. *Deutsche - Reichsban - Gesellschaft* (1938), 277 N. 474 at 478;
Hutchinson v. *Ward* (1908), 192 N. Y. 375.

Forum non conveniens is certainly an adaptation since it left the land north of the Tweed and descended upon us. In American acceptance, it is, say writers an innovation, or "judge made", or a form of "common law". Mr. Paxton Blair, later Mr. Justice Blair of the Supreme Court of the State of New York, who first gave the term wide currency in his legal article, *Forum Non Conveniens in Anglo-American Law, 29 Columbia Law Review 1-34,* January 1929, explains the rationale of the decisions in New York. See also the recent opinion of Mr. Presiding Justice Peck of the Supreme Court, Appellate Division, First Department in *Rothstein* v. *Rothstein* (1947), 272 App. Div. 26, 27-28, affd. without opinion, 297 N. Y. 705 and the opinion of the First Department in *Fitzgerald* v. *Niles, Bement Pond Co.* (Dec. 1948), 274 App. Div. 499. The latter was an equity action under a collective bargaining contract. It was left to Connecticut, the home of the *Danbury Hatters* cases; but, if it had been an action for simple damages under the contract, the Court in its opinion does not indicate it would have been rejected as "non-commercial", "sociological", "political", "economic" or "blood, sweat and tears." See also the report of *Logan* v. *Bank of Scotland* (1906), 1 K. B. 141, where Sir Rufus

Isaacs, afterwards Lord Chief Justice READING, as counsel, cites some of the New York cases.

Without exhausting, in an application for certiorari, the legal literature on the subject, we flatly declare that there is no authority sustaining the statement made by appellee's counsel to the United States Court of Appeals in the case at bar to the effect that New York common law accepts foreign contract cases *only* when they are of a *commercial nature.*

The decisive legal battle for his proposition was fought and lost in *Terry* v. *Williams* (1938, 4th Case, First Department), 253 App. Div. 890. Defendant's counsel there, we trust, exhausted every possible means of escaping the jurisdiction of the New York Courts in a suit on an *accommodation personal* loan. Williams was a New Jersey resident served with New York Supreme Court process in New York City while there about his duties as a federal officer at the offices of the Federal Emergency Administration of Public Works in the Port Authority Building. The record of that case shows at pages 14-15, folios 42-44, that the owner loaned Williams, the defendant, 100 shares of stock of Dixie Drinking Cup, Incorporated, for Williams' "accommodation" and without consideration. These were pledged as collateral by Williams for a bank loan and the bank foreclosed on the shares. The owner, a New Jersey resident, assigned his claim to a Massachusetts resident, Terry, who began the suit. Williams attempted to escape the jurisdiction of the New York courts under the claims: of immunity as a Federal officer; that the bank was liable; that all the transactions occurred in New Jersey; that all the witnesses and documents were there and that he could only there produce his defenses. Mr. Justice JOHN E. MCGEEHAN held the case at Special Term for trial in the proper part of the New York Supreme Court. The defendant-appellant's case was as elaborately briefed as the case

at bar was below. The Appellate Division had so little doubt, that it affirmed without opinion and denied motions for a reargument and for leave to appeal to the Court of Appeals in 254 App. Div. 557. Summary judgment against Williams was granted by Mr. Justice LAUER at Special Term; this judgment was reversed (Feb. 1939, 6th case) 256 App. Div. 905 on the ground a triable issue of fact existed; the case was afterwards settled.

How many other foreign contract cases of what appellee's counsel calls "a non-commercial nature" are tried yearly in New York, we cannot inform ourselves; but we venture the opinion that never since *Terry* v. *Williams* has there been a successful attempt to escape jurisdiction under the argument made by appellee's counsel in the case at bar. Plaintiffs have failed only when they have attempted to foist "non-commercial" or even "commercial" cases on the courts of New York, *regardless of the relief sought,* as in *Rothstein* v. *Rothstein,* 272 App. Div. 26, *supra.* Damages for breach of contracts call for money payment whether the transaction originated in the marketplace or elsewhere.

The only possible foundation for appellee's argument is that the rationale of the New York decisions has been explained upon the ground that the "commercial supremacy" of that state makes hospitality towards foreign suits and suitors desirable in suits for damages for breach of contract; whilst large verdicts in tort cases should not encourage litigants to come here. When the distinction between commercial and non-commercial *contract* cases was valiantly pressed for decision in *Terry* v. *Williams,* the First Department, where the rule originated, found the claim so bare of merit that it would not even write an opinion or permit further inquiry in the Court of last resort.

What a paradox it would have been, if Williams in that case had removed to the District Court of the Southern

District of New York and it had been found that there was one New York law in the Court House at Foley Square *South,* but a different one in the Court House next door, at Foley Square *North!* Mr. Justice FRANKFURTER in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, interpreting *Erie R.* v. *Tompkins,* 304 U. S. 64, says this Court will have none of that.

After the preparation of these papers, *de la Bouillerie* v. *de Vienne* (Nov. 23, 1949, Official Advance Sheets, Dec. 24, 1949, No. 556), 300 N. Y. 60, is reported. That case is an action for false arrest in France of a French National by defendants now resident in New York under First Citizenship Papers. Chief Judge LOUGHRAN in reversing for an unanimous Court tersely finally commanded in preliminarily beginning, "there was here error of law":

> "Our courts are bound to try an action for a foreign tort when either plaintiff or defendant is a resident of this State" (p. 62).

Only when neither party is a resident, do we wander in that twilight zone where appellee led the Courts below so mournfully astray.

Further argument may be found in our briefs below; but, we respectfully submit that what we now present should be sufficient upon this application of limited scope.

The New York law having been so dazzlingly illuminated, since we, in our obscurity, sought to enlighten the Courts below, we respectfully request, by authority of *Michalelk* v. *United States Gypsum Co.* (1936), 298 U. S. 639 (memo), and many other rules and precedents, to add under our prayer for relief.

The writ of certiorari as prayed for should be granted; and that this Honorable Court also reverse.

Dated, New York, N. Y., 70 Pine Street, January 3, 1950.

Respectfully submitted,

MARTIN J. KELLY, JR.,
Counsel for Petitioner and Plaintiff-Appellant.